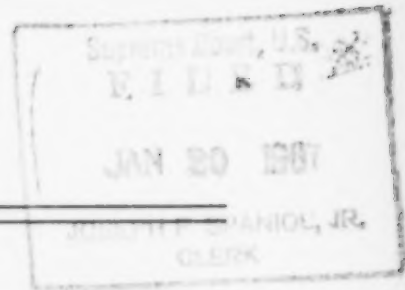


No. 65, Original



IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF TEXAS,

Plaintiff,

vs.

STATE OF NEW MEXICO,

Defendant.

Texas' Reply to New Mexico's Exceptions

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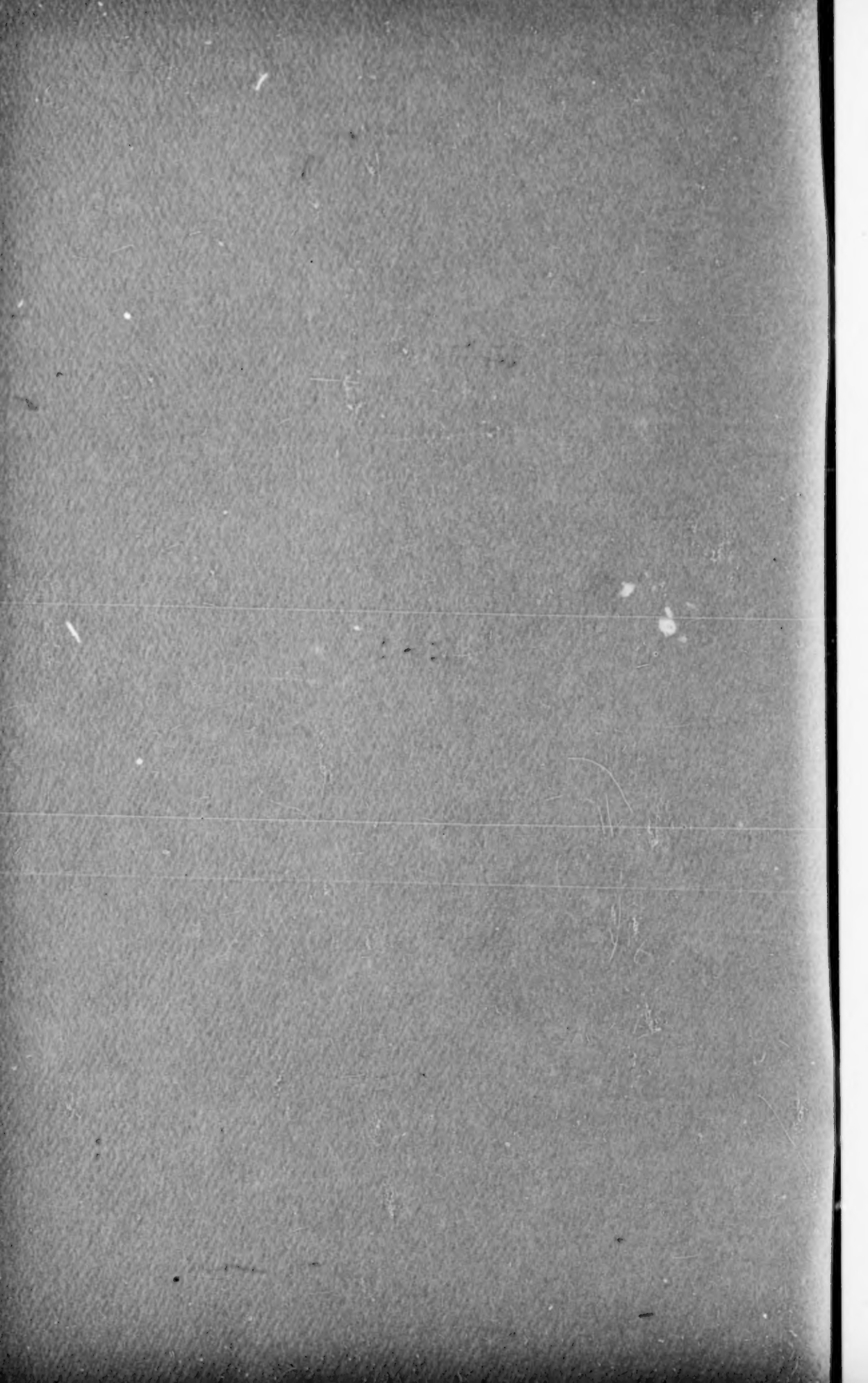


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Texas' Reply to New Mexico's Exceptions

Texas submits this reply to New Mexico's exceptions to the Special Master's Report. Citations to transcribed proceedings before him will be to the transcript page, followed by the date of the proceeding.

STATEMENT OF THE CASE

New Mexico lays little emphasis on the technical issues of fact which consumed the overwhelming bulk of the energies of the parties, the Special Master, and his technical consultant. Instead, the cast of its exceptions is predominantly toward the order and manner of proceedings before the Special Master. Therefore, the following map of the proceedings is provided to aid the Court in threading its way through the issues presented by New Mexico's exceptions.

On June 11, 1984, the Court summarily approved the 1984 Report of the Special Master, thereby establishing the formula for determining the quantity of water Texas would have received under the 1947 condition of the Pecos River each year of the 1950-1983 period. *Texas v. New Mexico*, 467 U.S. 1238 (1984). The decision left two basic issues for resolution in this case: the amount of shortfall in the annual river deliveries to Texas for the 1950-1983 period; and the extent to which the shortfalls were due to man's activities in New Mexico.

Shortly after the 1984 decision, the Court accepted the resignation of the previous Special Master and appointed his replacement, Mr. Charles J. Meyers. 468 U.S. 1202 (1984). Since his mid-1984 appointment, the new Special Master has stressed to the litigants his intention to complete work on the two remaining basic issues and forward his final recommendations to the Court so that it may render the "final decision" foreseen at the time of the 1983 remand of the case, *Texas v. New Mexico*, 462 U.S. 554, 556 (1983). See, e.g., May 22, 1985 Order, para. 7 (ordering counsel to prepare for November, 1985 trial on the merits); June 26, 1985 Letter to Counsel (setting trial dates). The parties lodged no objections to the plan and, accordingly, moved along the litigation course marked by the Special Master.

Under the Special Master's direction, documents were exchanged, and telephone conference calls and meetings were conducted. Then, on October 10, 1985, the Special Master entered a Pretrial Order governing the conduct of the trial on the merits which was to commence on November 18, 1985. The relevant portions of the October 10, 1985 Pretrial Order are reproduced in Appendix A to this reply.

The trial commenced as planned on November 18, 1985, and continued on November 19th, December 3rd, and December 4th. At the conclusion of the December 4th hearing, repeating his earlier admonitions, see, e.g., May 22, 1985 Order, para. 7, the Special Master reiterated that the late 1985 hearings were to be the last evidentiary hearings. Tr. 370-71 (12/4/85). See also Tr. 313-14 (Tr. 12/4/85).

In March, 1986, the Special Master issued a draft report, and in a transcribed proceeding on April 16th, heard oral argument on it. Two days later, he acceded to a request from New Mexico and set a hearing, which was to be limited to evidence on the amount of acreage in New Mexico that would be taken out of cultivation at four alternative rates of repayment of the water debt and the economic consequences of such reduced cultivation. April 18, 1986 Order. The hearing occurred on May 20th and 21st, with limited evidence also taken on the meaning of a Texas exhibit that had been introduced at the December 3rd hearing.

In late July, 1986, the Special Master forwarded his final Report to the Court, where it was ordered filed on October 6, 1986. In the Report, the Special Master makes recommendations for the resolution of all the remaining issues in the case. These recommendations, in summary, are that New Mexico have to pay back to Texas 340,100 acre-feet of water over a thirteen year period (consisting of a contingent three year grace period, followed by ten years for repayment) and that New Mexico be placed under an injunction that will result in its having to fulfill its future delivery obligations under the Pecos River Compact ("Compact"). New Mexico has filed exceptions to the 1986 Report, and Texas now replies to those exceptions. New Mexico also listed its objections to the Special Master's Proposed Decree in an appendix. New Mexico's Exceptions, Appendix A. Texas' response to the objections is in Appendix B to this reply.

SUMMARY OF ARGUMENT

New Mexico has elevated its belatedly-raised afterthoughts in this case to the only issues it is raising. Each of its three exceptions should be overruled.

In its first exception, New Mexico argues that the Special Master failed to conduct an evidentiary hearing on the extent to which man's activities in New Mexico caused negative departures from the 1947 condition. To put it bluntly, the argument is groundless and flatly contradicted by the record. The record demonstrates that New Mexico has fundamentally mischaracterized the course of proceedings before the Special Master. For at least a half year, New Mexico was formally on notice that a final hearing was to be conducted in this case and that man's activities was to be litigated in that hearing. Every factual issue listed by New Mexico in the governing pretrial order was litigated and decided. New Mexico registered no objection to the subject matter litigated at the final hearing and was repeatedly informed that the hearing was the last one. Texas introduced persuasive evidence establishing the extent to which negative departures were due to man's activities in New Mexico. New Mexico offered no evidence. It was only well after the conclusion of the final hearing and after the Special Master had issued a draft report finding Texas' evidence

persuasive, that New Mexico objected to the proceedings. Its objection is nothing more than a bold, but baseless, effort to obtain a second chance to litigate an issue that it already has lost. The fact that it has lost the issue is not a ground for its being allowed to try it again.

In its second exception, New Mexico argues that, under the Pecos River Compact, it does not have to repay Texas 340,100 acre-feet of water it failed to deliver in accordance with Article III(a) of the Compact. For thirteen years, this litigation has been directed toward a determination of the amount of water New Mexico owes Texas. The Court's 1983 decision left that determination as the only remaining issue and constitutes the law of the case. There is no reason to reexamine the decision. Even if there were, the Compact's language and structure and the history of its development establish that New Mexico's Article III(a) water delivery obligation to Texas is a firm one that is to be performed annually. Through the Compact, Texas has a contractual right to the water, and New Mexico has a contractual obligation to deliver it. The Court has the power to order compliance with the Compact, including the power to order repayment when the Compact's delivery requirements are violated. The Court's acceptance of New Mexico's argument that it may violate its Compact obligations and not be held legally accountable would constitute a grave injustice to Texas, which entered into the Compact instead of seeking an equitable apportionment of the Pecos River, and would discourage other states from resolving their disputes through compacts. The Court has been unstinting in ordering non-compliant states to abide by their contractual obligations, and there is no reason New Mexico should be excused from abiding by the Court's long-established principles.

In its third exception, New Mexico argues against three specific aspects of the relief recommended by the Special Master. It disagrees with the recommended period for repayment of its debt to Texas, but it offers the Court neither a standard for determining what the period should be nor its own view of the appropriate period. Assuming the Court decides this case in 1987, New Mexico's water debt to Texas would be finally repaid seventeen years after the last violation adjudicated thus far in the case and a half century after the first violation. By

any applicable standard, this payback period is fair. Its fairness is enhanced because, if New Mexico complies with the decree in good faith, it will not have to pay any interest on its debt. New Mexico also disputes the Court's authority to order that interest be paid on the debt New Mexico has accrued due to its Compact violations. The interest will not be imposed at all unless New Mexico acts in bad faith. Even if New Mexico acts in bad faith, it does not begin to run until 1995, eight years into the payback period. Even if full interest payments had been ordered, the principles established in *Rodgers v. United States*, 332 U.S. 371 (1947), would validate the requirement. It necessarily follows that a less onerous interest requirement is valid. Finally, New Mexico asks the Court for permission to repay its debt in money instead of water. New Mexico did not present this argument to the Special Master as an issue. It offers no authority in support of its argument. The reason for its request for a money alternative is clear. The Court's granting of it would necessitate a remand to the Special Master for further evidentiary hearings on the fair market value of the past-due water, thereby further postponing New Mexico's day of reckoning under the Compact. No further delay should be countenanced. New Mexico should be ordered to begin complying with the Compact and to begin the repayment of the water it has illegally withheld from Texas.

ARGUMENT

I.

In the final evidentiary hearing before the Special Master, Texas proved the extent to which state line departures were due to man's activities, and New Mexico offered no rebuttal.

In setting the stage for its first exception—that “the master refused to hold an evidentiary hearing on the extent to which departures were due to man's activities in New Mexico,” New Mexico's Exceptions, at i & 14—New Mexico has fundamentally mischaracterized the course of proceedings before the Special Master. The problem is not that the Special Master refused to hold a hearing on the effects of man's activities on New Mexico's departures from its Article III(a) delivery obliga-

tions. He did hold such a hearing. The problem, instead, is that, when given the opportunity, New Mexico offered no evidence at all to rebut Texas' proof on the issue. The fault, as the record demonstrates, lies with New Mexico, not the Special Master.

After the Court's 1984 decision and appointment of the new Special Master, New Mexico, as well as Texas, had nearly a year and a half to prepare for the final trial on the merits which commenced in November, 1985. In an order entered in May of 1985, the Special Master forewarned the parties that they "should prepare for a trial on the merits in November, 1985 of the issue of depletions caused by man's activities." May 22, 1985 Order, para. 7. Neither state objected. That New Mexico understood and accepted the import of the May 22nd admonition is clear from a statement of its counsel at the commencement of the evidentiary hearing on November 19, 1985. He acknowledged that the Special Master's May 1985 directive contemplated that the November trial would be "on all remaining issues of fact . . ." Tr. 28 (11/19/86).

The October 10, 1985 Pretrial Order provided the parties the opportunity and duty to list "all remaining issues of fact," as well as of law, to be resolved through the November trial. New Mexico's statement of the remaining disputed issues of fact on the "causes of depletions" are listed in Part II.B.4(a)-(c) of the Pretrial Order, p. A-3, *infra*. The only three listed factual disputes over the causes of depletions concern what came to be known as the Upper Reach issue, the McMillan dike issue, and the Capitan Aquifer issue. New Mexico lists no other disputed causes of depletion.

As the evidentiary proceedings drew to a close, the Special Master urged the parties to work toward an amicable settlement of "these three issues that are outstanding," listing the same three issues New Mexico had listed in the Pretrial Order. Tr. 319-20 (12/4/85). No settlement was reached, and the Special Master has made recommendations on the resolution of each of the three issues—the Upper Reach, 1986 Report 22-26; the McMillan dike, 1986 Report 11-22; and the Capitan Aquifer, 1986 Report 26-30. New Mexico has accepted all three recommendations. New Mexico Exceptions 6.

The picture revealed by a review of proceedings before the Special Master is radically different than the one painted by New Mexico. The Special Master gave New Mexico ample opportunity to raise the factual issues it thought appropriate for trial, even to the point of granting it special indulgence, because of its quasi-sovereign status, to litigate the Capitan Aquifer matter—a tardily raised, technically complex issue of potentially enormous significance.¹

Yet, on the factual issue which it now characterizes as “critical,” *see* New Mexico’s Exceptions 12, New Mexico chose repose. When Texas offered into evidence the document which accounted for all causes of departures other than human ones, New Mexico stipulated to it. Tr. 11-12 (11/18/85) (admission into evidence of Tex. Exh. 73; agreement to subsequent modification); Tr. 103 (12/3/85) (admission into evidence of Tex. Exh. 79, modifying Tex. Exh. 73). New Mexico offered no subsequent testimony or other evidence to rebut Tex. Exh. 79.

The basis for New Mexico’s approach on this issue is unknown and undisclosed. The possible explanations run the speculative gamut from an absence of technically supportive evidence, through subtle, but misdirected, trial strategy, to outright oversight. Whatever the reasons, the fact remains that Texas came forward with evidence which answered the “two subsidiary questions” posed by the Court in its 1983 decision. Tex. Exh. 79 established the human-caused shortfall in New Mexico’s Article III(a) delivery obligations for the 1950-1983 period. New Mexico offered no rebuttal.

The Special Master’s findings on this issue are clear and succinct. In regard to the testimony of the expert witness for

1. At trial, Texas strenuously argued against the admission of any evidence concerning the Capitan Aquifer, implicating nearly 100,000 acre-feet of water, because New Mexico inadequately identified it as an issue. Tr. 22-23 (11/19/85). The Special Master indicated that in an ordinary case he probably would sustain Texas’ objection, because the issue was raised too late; however, because the litigants were two sovereign states, he overruled Texas’ objection and allowed the evidence, but concluded: “I will make it crystal-clear now on the record I will not allow any other new issues in this case.” Tr. 33 (11/19/85). Emboldened by the successful reliance on its quasi-sovereign status to inject a major new issue after trial commenced, New Mexico now seeks permission to relitigate a factual issue on which it failed over a year ago to present evidence.

Texas who was the principal author of Tex. Exh. 79, the Special Master found:

Dr. Murthy's testimony made it clear that the procedures followed in Tex. Exh. 79 accounted for all non-manmade depletions so that any residual departure was, by force of logic, the result of man's activities.

1986 Report 9. With the facts established by Dr. Murthy's testimony as a backdrop, the Special Master then explained the role of Tex. Exh. 79:

It is both logically correct and, at this stage of the proceedings, practically necessary to hold that once Tex. Exh. 79 was agreed to, the departures show therein constitute New Mexico's shortfall in the required deliveries under Article III(a) unless New Mexico can show otherwise. On the technical side she has not done so.

1986 Report 10.

At the conclusion of proceedings before the Special Master, he explained the matter to New Mexico's counsel. The explanation gives the true flavor of the issue New Mexico now tries to raise in its first exception:

SPECIAL MASTER: You [New Mexico] didn't dispute any evidence and you were on notice; if you thought there was something wrong and deficient about Texas Exhibit 79 you should have come forward last November and last December to say so and you didn't do that.

.

You were taking a very high risk, weren't you? . . . If you had any substantive evidence, you should have put it on. But you were certainly not surprised . . .

.

I expected you to put on in December any evidence

of that sort that you had. Did you have any?

MR. WHITE: Evidence on unknowns?

SPECIAL MASTER: Not on unknowns, but evidence that says no, this is not man-made.

MR. WHITE: *We put everything we had on.*

Tr. 347-49 (5/21/86) (emphasis added).

With this background, the issue becomes much simpler than New Mexico frames it. Legal inquiry into the proper allocation between the two states of the burdens of production and persuasion on whether state line departures are due to man's activities is unnecessary. Although Texas argued—and still does—that the burdens rested on New Mexico, *see* 'Texas' Response to New Mexico's Memorandum on the Burden of Proof *and* 'Texas' Response to New Mexico's Reply on the Burden of Proof, Texas met both burdens through Tex. Exh. 79, as elucidated by the testimony of Dr. Murthy, its chief preparer. Tr. 311-34 (5/21/86). That is, Texas presented evidence that the departures calculated in Tex. Exh. 79 and listed in column 7 of Table 2 of the exhibit were due to man's activities in New Mexico. The Special Master was persuaded. 1986 Report 9-10. New Mexico "put everything [it] had on," Tr. 349 (5/21/86), amounting essentially to nothing.

As the record demonstrates, New Mexico's claim that the Special Master refused to hold a hearing on the extent to which departures were due to man's activities in New Mexico is a hollow one. It received a hearing, lodging no objections to the conduct of the hearing. Later, based on the evidence introduced at the hearing, it received an adverse recommendation. Only then did New Mexico decide to argue that the hearing should have been conducted differently.

New Mexico's argument amounts to nothing more than a plea that it be given a second chance to defeat Texas' claim. This approach demeans the dignity afforded the parties by the Court's assertion of original jurisdiction over their controversy and calls for a summary overruling of New Mexico's first exception.

II.

The Compact and the Court's prior decisions in this case establish that New Mexico must repay the water it illegally withheld from Texas for the 1950-1983 period.

For nearly thirteen years, this litigation has been directed towards a determination of how much water New Mexico owes Texas as a result of New Mexico's failure to abide by the obligations it assumed in Article III(a) of the Compact.² The Court remanded the case to the Special Master in 1983 for a final decision on that very issue. 462 U.S. at 574-75. In its second exception, New Mexico asks the Court to declare that these exceptions were for naught and hold that New Mexico may not be held liable for Article III(a) violations.³

If adopted, New Mexico's position would convert this case into a pointless exercise, constituting nothing more than an

2. From the inception of the suit, New Mexico has understood that Texas was seeking an order requiring New Mexico to repay the past due water. Tr. 58 (5/20/86) (principal New Mexico water official acknowledges the point). See, e.g., New Mexico's Trial Brief Pursuant to Paragraph 5(a)(4) of the Special Master's Pre-Trial Order of October 31, 1977 (Aug. 1, 1978) (at 22: "Texas claims that it is entitled to damages and to performance . . ."). Yet, it did not raise the issue until the very end of the last of a long series of evidentiary hearings spanning twelve years. Once again, the Special Master told New Mexico that if it were a private litigant he would rule that "it was too late to raise it by a long shot." Tr. 436 (5/21/86). Nonetheless, once again, because of New Mexico's quasi-sovereign status, he allowed the issue to be raised. *Id.* See also 1986 Report 38. New Mexico's acquiescence to twelve years of litigation of the issue and its failure to object to any of the vast amount of evidence offered on the issue constitutes a waiver of its second exception. Furthermore, the law of the case precludes New Mexico's second exception.

3. New Mexico's position is even more extreme than the text states. In an appendix to the brief supporting its exceptions, New Mexico argues against inclusion in the decree of a provision requiring New Mexico to fulfill its Article III(a) obligations in the future. New Mexico's Exceptions, Appendix A, para. 1. New Mexico did not except to the Master's recommendation to insure future compliance, see 1986 Report 42-46, and, therefore, is now bound by it; nonetheless, through the objection, New Mexico has plainly asserted the view that it may violate the Compact at will without any legal accountability.

expensive, extended seminar for the Court on advanced mathematical techniques and hydrology. Even worse, it would render the Compact a nullity and threaten compacts as viable solutions to interstate disputes. Nothing in the Compact's language, the Compact's history, or the facts of this case justifies the result New Mexico seeks. On the contrary, these sources amply support the Special Master's recommendation that New Mexico repay Texas the 340,100 acre-feet of water it illegally withheld from Texas during the 1950-1983 period.

The Compact abounds with language demonstrating that it apportioned the water of the Pecos River between the two states and imposed on New Mexico a legal duty to deliver Texas its water in accordance with the apportionment. The preamble explains that the two states have agreed on the "apportionment and deliveries" of the water. Article I lists the "equitable division and apportionment" of the water as the first major purpose of the Compact. The linchpin of the Compact, Article III(a), establishes New Mexico's specific delivery duty in mandatory terms:

New Mexico *shall not* deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which *will give* to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

(Emphasis added).

Article VI establishes governing principles for the "apportionment" accomplished in Article III(a). One of the governing principles requires that the accountings be done annually using progressive three-year averages. *See* Article VI(b). Article VIII speaks of the "obligations" of the Compact. Article IX refers to "maintaining" the state line flows "required" by the Compact. Article X establishes that Texas has a "right" to the water "apportioned to it" by Article III(a), as does Article XIV in its reference to "rights established" under the Compact. Finally, Article XV mandates that the Compact become "binding and obligatory" as of June 9, 1949, the date of Congressional consent.

From the perspective of whether the Compact creates an enforceable legal relationship between Texas and New Mexico regarding the waters of the Pecos River, the Compact's language could not be clearer. New Mexico's attempted elucidation of standards for determining implied obligations is irrelevant. See New Mexico's Exceptions 30 (discussing when an obligation is implied). The obligation here is explicit. The Compact *apportions* Pecos River water between New Mexico and Texas; it *obligates* New Mexico to deliver Texas' apportioned share annually to Texas according to the Article III(a) measure; and it gives Texas the *right* to the annual deliveries of its apportioned share.

That the Compact contemplates that New Mexico shall be held accountable for any failures in meeting its delivery obligations is established by more than just its plain language. In explaining the meaning of the Compact to the Compact negotiators, Mr. Tipton, the Chair of the Engineering Advisory Committee at the time the Compact was negotiated, provided straightforward support for the interpretation demanded by the Compact itself—that is, that it creates a legally enforceable, annual delivery obligation. Regarding Article III(a), Mr. Tipton stated:

What it means is that of a given inflow Texas will receive *each year* essentially the same proportion which she received under the "1947 condition."

Subparagraph (a) of article III is a *firm obligation* on the part of New Mexico to see that Texas receives that quantity of water, and there is nothing in article III or any other place in the compact which affects in any way the obligation of New Mexico to deliver this amount of water . . .

Stip. Exh. 1, S. Doc. 109, 81st Cong., 1st Sess. (1949), at 116 [hereinafter, "S. Doc. 109"] (emphasis added). Immediately following this explanation, the Texas legal advisor engaged Mr. Tipton in a colloquy:

JUDGE KERR. [I]s it possible to determine the exact amount of water which Texas would be entitled

to receive under the varying conditions which are set out in that report?

MR. TIPTON. Yes, that is correct.

Id.

Even if the Compact were otherwise ambiguous, the import of these explanations is unmistakable: for each year of operation under the Compact, Article III(a) requires New Mexico to deliver to Texas a determinable amount of water. A failure to do so renders New Mexico legally accountable.

New Mexico's brief is unencumbered by a discussion of the Compact's language or Mr. Tipton's explanation of the firm annual obligation it creates. Instead, it devotes itself to a lengthy explanation of why the Compact included neither a schedule nor a system of debits and credits, arguing that, therefore, it need not meet its annual Article III(a) obligation. New Mexico's Exceptions 24-29. The premise is correct, but the conclusion drawn from it is fundamentally wrong, as the discussion above demonstrates. A very brief detour into the arcane world of interstate water compacts will help explain why New Mexico's discussion is off the mark. A compact that apportions interstate waters by a schedule of deliveries typically will include a system of debits and credits to impart some flexibility to the rigidity of a fixed delivery schedule. *See, e.g.,* Rio Grande Compact, 53 Stat. 785 (1939). Because the Pecos River basin is hydrologically complex, 1979 Report 5-6, a somewhat more flexible obligation was established so that the interrelationships of the complex factors affecting it could receive more attention. S.Doc. 109, at 117. Instead of stating New Mexico's obligation in terms of a schedule (e.g., New Mexico shall deliver X acre-feet per year to Texas), Article III(a) states the obligation in terms of a standard that incorporates the complex factors—the 1947 condition. Thus, the absence from the Compact of a schedule and a debit-credit system says nothing about whether New Mexico must pay back water it agreed to but did not deliver to Texas.

The concept that an entity such as New Mexico should have to return something (such as the water in this case) that it has

obtained illegally to those who have a legal right to it is not exactly revolutionary. The Court has stated:

[T]he obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.

Ward v. Love County, 253 U.S. 17, 24 (1920). In that case, a county had collected taxes on Indian allotments. A legal attack on the authority to collect them succeeded, and the Court ordered the county to repay the taxes.

Putting aside the language of the Compact anticipating the possibility that judicial enforcement of its terms might be necessary, *see* Article V(f) (Compact Commission findings not conclusive "in any court"), this Court has the power to determine the nature and extent of compact obligations between states. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). In doing so, the Court may fashion appropriate relief. *Cf. Bell v. Hood*, 327 U.S. 678, 684 (1946) (courts adjust remedies to grant necessary relief where federal rights are invaded); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (basic rule is that courts give a remedy for violation of a legal right).

Even in original jurisdiction controversies between sovereign states, such fundamental maxims of judicial power apply. "That judicial power essentially involves the right to enforce the results of its exertion is elementary." *Virginia v. West Virginia*, 246 U.S. 565, 592 (1918). In the past, the Court has been unswerving in ordering states to perform obligations to another state which they have assumed under compacts and then breached. *See, e.g., West Virginia ex rel. Dyer v. Sims, supra*, 341 U.S. 22 (state's agreed-upon contribution to compact administration to be paid, notwithstanding contrary state law); *Kentucky v. Indian*, 281 U.S. 163 (1930) (specifically enforcing state's agreement to construct a bridge). This principle extends to requiring the payment of money for a breached obligation. *Virginia v. West Virginia, supra*, 246 U.S. 565.

The same legal principles apply here. The Compact imposes annual delivery obligations on New Mexico and creates a concomitant legal right in Texas to those deliveries. New Mexico has breached those obligations, and Texas seeks recompense. It is the Court's function to order that the recompense be provided, and nothing in the compact withdraws that function. As the Court has explained:

It cannot be gainsaid that in a controversy with respect to a contract between states, as to which the original jurisdiction of this court is invoked, this court has the authority and duty to determine for itself all questions that pertain to the obligations of the contract alleged.

Kentucky v. Indiana, supra, 281 U.S. at 176. New Mexico was to deliver determinable amounts of water to Texas for the 1950-1983 period. The Court's authority and duty is to "enforce the result of its exertion[s]" in this case and order payback of the shortfall.

This historical background reveals that, after decades of acrimony between the two states over the Pecos River, Texas was persuaded to take the compact route to apportionment of the water rather than the route of equitable apportionment through litigation. *See, e.g.*, S. Doc. 109, at 4-8. *See also* 462 U.S. at 569 (threat of litigation prompted New Mexico's agreement to the Compact). Many times, this Court has encouraged the use of compacts to resolve interstate water conflicts and suggested that disputing states take the route chosen by Texas. *See, e.g., Colorado v. Kansas*, 320 U.S. 383, 392 (1943). The Court's adoption of New Mexico's position that an upstream state remains legally unfettered by its solemnly undertaken delivery obligations would constitute a cruel trick, not only to Texas in this case, but to any state that has taken the Court's admonitions to heart and foregone its equitable apportionment option. Texas did not bargain away its right to seek an equitable apportionment of the river in exchange for the sole relief New Mexico proposes—that is, gradual future adjustments in New Mexico's water consumption patterns that might, but would not necessarily, even more gradually increase state line flows in the future. As the Special Master cogently explains, such

relief would be meaningless and would convert the Compact into an "illusory contract." 1986 Report 40-41. This Court's 1983 decision foredooms New Mexico's argument: "It is difficult to conceive that Texas would trade away its right to seek an equitable apportionment of the river in return for a promise that New Mexico could, for all practical purposes, avoid at will." 462 U.S. at 569 (footnote omitted).

As a last resort, New Mexico simply claims that it would be inequitable to require it to pay Texas the water it owes.⁴ Engaging once again in its penchant for trying to rejuvenate issues already resolved against it, New Mexico suggests a laches defense, New Mexico's Exceptions 32, already rejected by the Court when it approved in full the 1979 Report. 446 U.S. 540 (1980). If the equities are to be weighed, the balance tips decidedly in favor of Texas, which has been deprived over a thirty-four year period of water to which it remains legally entitled. Thirteen years of litigation have been directed at quantifying this amount with reasonable specificity, yet New Mexico has not take a single step to increase its deliveries to Texas. Tr. 55 (5/20/86). Moreover, it adamantly refuses to abide by its Compact obligations until ordered by the Court. New Mexico's chief water official testified in the concluding phase of the hearings before the Special Master:

MR. REYNOLDS. I can not and will not in administration try to enhance state-line flow until there is a Commission finding or a court decree saying that that's necessary.

Tr. 55 (5/20/86).

The Court already has ruled against New Mexico on the issue of whether it can be required to pay back to Texas the water it failed to deliver in accordance with its legal obligations under

4. To evade its Compact obligations, New Mexico enlists the aid of *Wyoming v. Colorado*, 309 U.S. 572 (1940), in which the Court refused to issue a contempt citation against a state for a minor violation of an earlier equitable apportionment of a river. There is no legal similarity between the *Wyoming* case and this one. The violations here are massive and longstanding. In addition, this litigation is at the relief stage. The onerous burdens of proof applicable in a contempt proceeding are absent here.

the Compact. The 1983 decision does not need to be revisited. Through its second exception, New Mexico indicates that only strong words and explicit directives will suffice to impress upon it the meaning of a legal obligation and the importance of having even a sovereign state abide by a federal law to which it has consented. Texas urges the Court to provide New Mexico such words and directives.⁵

III.

The Special Master's recommended relief, including the provisions that New Mexico's water debt be repaid in thirteen years, that it be repaid in water, and that water interest be imposed if New Mexico acts in bad faith, is proper and based on a consideration of all relevant factors.

New Mexico's final exception is to the details of the retroactive relief recommended by the Special Master. Only three specific complaints are made: to the ten-year payback period;

5. Eight New Mexico municipalities have filed an *amici curiae* brief arguing that the Eleventh Amendment prohibits the Court's assertion of jurisdiction in this case and that the Court's doctrine for determining whether a private right of action is implied operates here to deny Texas retroactive relief under the Compact. The *amici* cities' Eleventh Amendment argument ignores two points. First, once it is delivered, the water is the property of the state, not of its citizens. See TEXAS WATER CODE ANN. § 11.021 (Vernon Supp. 1987). Second, the Court already has held that the Eleventh Amendment defense is inapplicable in interstate water disputes between two states. See, e.g., *Colorado v. New Mexico* 459 U.S. 176, 182 n.9 (1982). The *amici* cities' second argument cuts in favor of Texas, rather than against it. First, a basic reason for the Court to engage in its implied rights of action analysis is to determine whether a written provision gives private individuals a cause of action in addition to the governmental right of action apparent on its face. Here, a governmental right of action is at issue, not a private one. The governmental right of action is apparent on the face of the Compact. Second, even if the implied private rights of action analysis were applicable, it would support Texas' position. The key inquiry is into the intent of the provision. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 13 (1981). The inquiry starts with the language of the provision to determine whether it is phrased in terms of the persons benefited, *Cannon v. University of Chicago*, 441 U.S. 677, 692 n.13 (1979), and whether it is in mandatory terms, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 18 (1981). The intent of Texas and New Mexico is obvious. Texas is the stated beneficiary, and the obligation on New Mexico is stated as a mandate.

to the water interest provision; and to the requirement that the debt be repaid with water. New Mexico also registers a generalized complaint that the Special Master did not "balance the equities," but it points to no legal flaw, other than the three already listed, which flows from this generalized grievance. Therefore, the Court is only given three specific objections for resolution. The generalized complaint raises no separate legal issue; however, because it is used to color New Mexico's specific arguments, it will be discussed first.

Generalized Complaint

The dissatisfaction with the Special Master's resolution which New Mexico voices in its general complaint that he did not balance the equities properly is, upon analysis, only the expression of a vague, unfocused displeasure with the results of his balancing efforts. It is exemplified by New Mexico's castigation of the Special Master for what it claims is a lack of caution in approaching his responsibilities. New Mexico's Exceptions 35.⁶ Much of the argument supporting the vaguely-expressed dissatisfaction is devoted to deriding the Special Master for remedial recommendations in his *draft* report of March 18, 1986. The problem with New Mexico's complaint in this regard is obvious. The March 18th document was a draft report, specifically issued to give the litigants an opportunity to level criticisms at it while the Special Master still had it within his power to respond. *See, e.g.*, Tr. 315 (12/4/85); Tr. 2-3 (4/16/86) (explaining purpose for issuing report in draft form first). Not only did the Special Master devote an entire day on April 16th to oral argument on the draft report, he acceded to New Mexico's request for a hearing on relief and remedy, which was conducted over a two day period in May, 1986.

6. Running as an undercurrent through New Mexico's exceptions is the suggestion that the Special Master was unfair to New Mexico. *See* New Mexico's Exceptions 12 (accusing him of "cut[ting] short" the proceedings); 14 (claiming he "skimmed over" a key matter, "passed [it] by swiftly," and "bolstered" his views with Texas evidence); 17 (accusing him of giving "short shrift" to a matter); 18 (claiming he "skated quickly" to decision); 33-34 (asserting he "plunged into" an issue); 35 (claiming he failed to use "the caution warranted"); and 39 (arguing that a recommendation is an "offense to New Mexico"). These examples may be only rhetorical excesses;

(Footnote continued on next page)

New Mexico's generalized complaint that the Special Master recommended the relief without balancing the equities is transparently wrong, as a perusal of the longest section of his Report reveals. 1986 Report 30-46 (section on remedy). As explained below, he gave detailed consideration to each specific exception New Mexico raises. The real problem lies elsewhere, in the origins of New Mexico's misdirected effort to lodge a generalized complaint unanchored to any specific resulting recommendation other than the three discussed below. New Mexico is trying to force arguments with some applicability to an equitable apportionment case into a compact case mold. Broad appeals to balancing the equities have a place in equitable apportionment jurisprudence, which is based on a "flexible doctrine" requiring delicate equity adjustments. *See, e.g., Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). The broad appeals are inapposite here.

In the context of interstate water compacts, the difficult reconciliation of competing interests is performed by the contracting parties and embodied in the compact. The equities already have been balanced before the matter becomes one of

(Footnote 6. continued from previous page)

however, they leave the aftertaste left by a direct allegation of unfairness. Reality belies this suggestion. Over objections from Texas, the Special Master repeatedly acceded to belated demands from New Mexico that it be allowed to present evidence on and raise major issues that, in typical civil litigation, would have been rejected. He allowed New Mexico to surprise Texas with the technically complex issue of the Capitan Aquifer, despite New Mexico's never specifying it as an issue in the twelve years it had known about it. Tr. 33 (11/19/85); Tr. 269 (12/4/85). He allowed New Mexico an evidentiary hearing on remedies after argument on the draft report and after having repeatedly warned New Mexico earlier that the late 1985 hearings were the last evidentiary hearings. Tr. 370-71 (12/4/85); Tr. 93, 113-14 (4/16/86). At the hearing on remedies, he allowed New Mexico to adduce evidence on Tex. Exh. 79 despite the fact that it had been admitted by stipulation six months earlier and despite the fact that the hearing was supposed to be on other topics. Tr. 322 (5/21/86). Finally, he allowed New Mexico to raise and brief the issue of retroactive relief after the last hearing and in spite of New Mexico's failure to raise the issue during twelve years of litigation devoted exclusively to the facts underlying the issue. Tr. 436 (5/21/86). The Special Master was highly indulgent of New Mexico's proclivities to extend the proceedings through the last-minute injection of new issues. No fair-minded reading of the record can result in any other conclusion than that New Mexico was given a full and fair opportunity to present its case. That it failed cannot be blamed on the Special Master.

judicial concern. Often, the compact balances interests differently than the Court, acting without textual guidance, would. Article X of the Compact exemplifies the difference. In an equitable apportionment case, failure to use water typically results in a relinquishment of the right to it. *See, e.g., Colorado v. New Mexico, supra*, 459 U.S. at 184-85. In Article X, on the other hand, Texas and New Mexico agreed that non-use by one state does not effectuate relinquishment.

Thus, the Court should not allow New Mexico's generalized complaint about balancing the equities to cast an unfavorable light on complaints about specific portions of the remedial recommendations. The record reveals that the Special Master's recommendations are based upon a thorough assessment of the equities lying on both sides but within the confines of the Compact.

Ten-year payback period

New Mexico's specific objection to the delivery requirements which the Special Master recommends is to the ten-year payback period. New Mexico does not offer the Court any recommended alternative payback period or any standard for determining it.

Actually, the recommended payback period extends much longer than ten years. The payback would be for water owed only through 1983, it would run only from the date a decree is issued by the Court, and it would include an initial three-year grace period. Thus, assuming the Court enters a decree in July, 1987, Texas would finally have received the water New Mexico illegally withheld from it through 1983 in the year 2000. This is a seventeen year payback period. If anything, the equities favor a shorter payback period because, assuming New Mexico complies in good faith with the decree, Texas will receive no interest on the water illegally withheld from it over a thirty-four year period. In effect, New Mexico will have retained in some measure the fruits of its illegal actions for over a half century without paying any penalty. By any standard, this result is not unfair to New Mexico.

The Special Master gave careful consideration to the concerns

New Mexico expressed about the payback period. Even though he recognized that "the longer Texas must wait [for the water], the less the value of what she receives," 1986 Report 42, the Special Master recommended that New Mexico be given a three-year grace period to make preparations for its repayment deliveries. *Id.* 36. Notwithstanding Article X of the Compact, he even took into account whether Texas could use the water and concluded that "[c]learly, Texas can make use of the water that it is entitled to but has been deprived of for the last 30 years." *Id.* 42.

Water interest

New Mexico devotes a short two paragraphs to its argument against the inclusion of any water interest requirement in the decree. New Mexico's Exceptions 39. Any evaluation of the validity of this component of the recommended relief must begin with a recognition that it is not "interest on a judgment" as that concept typically is understood. First, it is contingent. It would not accumulate at all if New Mexico operates in good faith under the decree. Second, even if New Mexico did not operate in good faith, the interest would not begin to accumulate until at least five years after the payback period begins to run. Under the assumption that the Court enters a decree in mid-July, 1987, the earliest the interest could begin to accumulate would be the middle of 1995, twelve years after the last of the illegal water diversions adjudicated in this case.

Thus, the Court cannot evaluate the challenged water interest concept under legal standards derived from decisions about whether interest on a judgment is permissible. Instead, the concept must be evaluated as would any other provision in an equitable decree. Is it carefully crafted to remedy the harm done?

When a federal statute creates an obligation but contains no prohibition of interest on the obligation, the Court "weighs the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed." *Rodgers v. United States*, 332 U.S. 371, 373 (1947). The general rule is that the equities will be weighed to allow interest for the party to which the obligation is owed and which has been harmed by a breach

of the obligation. *Id.* Application of these equity principles to this case easily supports the Special Master's interest recommendation. The Compact is a federal law, 462 U.S. at 564, containing no prohibition on the award of interest for breaches of the obligations it creates. New Mexico has breached its obligation to Texas which has been harmed by the breach. As *Rodgers* holds, the interest in such a situation may be awarded to insure full compensation for the loss. It surely follows then that the recommended water interest, which is only contingent and does not extend itself even as far as the *Rodgers* principle, is appropriate.

Monetary alternative

New Mexico concludes its exceptions with a request that the Court allow it the option of repaying its water debt to Texas in money. New Mexico's Exceptions 39-40. The use of the term "request" is deliberate. New Mexico offers no argument in support of the request and cites no authority in support of it. The real reason for the request is revealed in its last sentence. *Id.* 40. The Court's granting of it would necessitate a remand to the Special Master for further evidentiary proceedings because no hearing has been conducted on the fair market value of the water New Mexico owes Texas. New Mexico never availed itself of the opportunity to request such a hearing and never posited the monetary alternative as a legal issue. There is no basis for further delaying the resolution of this case by indulging once again New Mexico's habit of manufacturing new issues which inevitably result in the postponement of its day of reckoning under the Compact. In the past the Court has ordered a state to perform the specific obligation it had assumed but breached. See *Kentucky v. Indiana, supra*, 281 U.S. 163. It should do the same here. New Mexico has failed to perform its water delivery obligation to Texas. After thirty-seven years under the Compact and thirteen years of litigation before this Court, New Mexico should finally be required to fulfill its broken promise to Texas. It has no further excuses for delay. Texas' portion of the Pecos River should be returned to it in accordance with the Special Master's recommendation.

CONCLUSION

For the foregoing reasons, the exceptions of the State of New Mexico to the Report of the Special Master should be overruled. "A river is more than an amenity, it is a treasure." *New Jersey v. New York*, 283 U.S. 336, 342 (1931). After formally agreeing with Texas to the division of the treasure, New Mexico withheld a large part of it. The Special Master's Report recommends a final resolution of this case which will restore to Texas its bargained-for share of the treasure and insure it receives its share in the future.

Respectfully submitted,

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